April 15, 1986

REPORT TO THE COMMITTEE ON PUBLIC SERVICES AND SAFETY
POTENTIAL CITY LIABILITY FOR DAY CARE CENTERS

Several years ago the City began contracting with the Ocean Beach Child Care Center and the YWCA to provide child day care services for parents who were in job training or educational programs. Our standard form contracts require comprehensive general liability insurance. During the recent insurance crisis, these agencies have informed us that they cannot obtain liability insurance for day care without a rider which excludes coverage for sexual molestation. On March 26, 1986 the City Manager prepared a report to your committee which recommended that the Council not waive the insurance requirements.

The Ocean Beach Child Care Center is represented by Mr. Manny Ramos. Mr. Ramos has written two memoranda regarding City liability for day care centers. It is possible to summarize these issues into three categories: The employer-employee situation; the case for liability because of funding; and the potential liability as a landlord.

In Mr. Ramos' memoranda, he cites Alma W. v. Oakland Unified School District, 123 Cal.App.3d 133 (1981), for the proposition that the employer may not be liable for the sexual misconduct of an employee. Alma W. did not extend liability to an employee where a school janitor's actions were neither incidental to or foreseeable from his duties. Alma W. was clarified in a later California Appellate Court case, White v. County of Orange, 166 Cal.App.3d 566 (1985), in which the court found a public employer could be liable for the intentional acts of its employees.

> Applying the Alma W. test to this case leads us to conclude the County will be liable for the actions of Officer Loudermilk should those actions be proven at trial. Our decision turns on the interpretation of the term "incident to his duties."
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> A police officer is entrusted with a great deal of authority. This authority distinguishes the situation here from the facts of Alma W. Unlike a school custodian, the police officer carries the authority of the law with him into the community. The

> officer is supplied with a conspicuous automobile, a badge and a gun to ensure immediate compliance with his directions. The officer's method of dealing with this authority is certainly incidental to his duties; indeed, it is an integral part of them. Here, unlike Alma W., the wrongful acts flowed from the very exercise of this authority.
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> It follows that the employer/government must be responsible for acts done during the exercise of this authority.
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> White v. County of Orange, supra at 571.

The White case was decided on a pretrial procedural motion, therefore the facts are not as fully developed as they are in Alma W. We think that the authority and control exercised by the instructors at the day care center would be more analogous to the custodial authority of the police officer in White than to the janitor in Alma W. If a court concurred, it would cause the City to have to bear the costs of litigating the issue and possibly incurring liability.

Another point touched on in the court's decision in White is that the question of liability is one of fact. A plaintiff has a constitutional right to have a fact question resolved by a jury. Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654 (1941). This type of case is emotional and the injured child may be the subject of great pity by the jurors. Since the day care centers cannot get insurance against this activity, any codefendant who is found even partially at fault may incur the full liability under the doctrine of joint and several liability. Li v. Yellow Cab, 13 Cal.3d 804 (1975); American Motorcycle Assn. v. Superior Court, 20 Cal.3d 578 (1978).

The California cases cited above indicate that there is a risk of liability for sexual misconduct of an employee. The policy of insurance provided by the Ocean Beach Child Care Center did not cover this risk. While the risk of liability cannot be neatly quantified because of differing fact patterns and evolving theories at liability, the risk of City liability is not unsubstantial.

The second area of discussion is the City's potential for liability as a source of funding to the agency. On this issue Mr. Ramos cites the U.S. Supreme Court case of United States v. Orleans, 425 U.S. 807 (1976). This is a case arising under the Federal Tort Claims Act. Mr. Ramos feels that California's

governmental protections for cities are more than adequate to insulate us from liability as a funding source.

While the Federal Tort Claims Act and the California Tort Claims Act are similar, the risk of exposure is not dependent on a comparison of these two acts. In the instant situation, the City is more than a mere funding source. There is a contractual relationship between the City and the Child Care Center for the provision of services to children whose parents are seeking to improve themselves by education and training.

A cause of action exists for the negligent selection of an independent contractor. Holman v. State of California, 53 Cal.App.3d 317 (1975). While the governmental entity can exercise certain immunities, these cannot be ruled on at preliminary trial proceedings. These defenses may raise fact questions which would go to the jury.

> The determination whether a defendant will be liable to a third person for negligence in performance of a contract in a specific situation involves a balancing of a number of policy factors, including (1) the extent to which transaction was intended to affect plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of connection between defendant's conduct and injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.
> County of Riverside v. Loma Linda University, 118 Cal.App.3d 300, 316-317 (1981).

Based on these cases and the situations that can occur, there are circumstances where a plaintiff could state a claim against the City. The policy of preventing future harm combined with the limited burden of additional monitoring, the foreseeability of the injury, and the moral blame attached to the defendant's conduct may be sufficient in some circumstances to establish a cause of action. Here the City is not like the Federal Government, carrying out a national policy by disbursing funds. We are in a negotiated contract with a provider of services to small children. We must monitor not only to see that the funds are properly spent, we must also see that the public purpose is achieved and the contract is fulfilled. We cannot say that some court would not say that we have a duty to assure the safety and

security of those students whose day care we are paying for.

The third issue relates to the use of City owned property by the Ocean Beach Children Care Center. In this instance we concur with Mr. Ramos that the City would not be in an adverse liability position if the Day Care Center were paying fair market rent. Since the City would not be subsidizing, endorsing, or involved in the operation of the facility, our exposure would be limited. It is possible to obtain adequate insurance coverage for landlord liability.

Respectfully submitted,
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City Attorney

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